TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 209.

HARRY GUNDLING, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED FEBRUARY 17, 1900.

(17,295.)

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Harry Gundling and the City of Chicago, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the
b Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Harry Gundling, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this tenth day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
BROWN,
Asso. Just. Sup. Ct.

c In the Supreme Court of Illinois.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the ninth day of February, in the year of our Lord one thousand eight hundred and ninety-nine, a copy of the foregoing writ of error for the defendants in error was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said court this ninth day of February, A. D. 1899.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

d UNITED STATES OF AMERICA, *ss:*

To the City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein Harry Gundling is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this tenth day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

e On this 12th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared Lee D. Mathias before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Howard S. Taylor, acting attorney for the city of Chicago in the above-entitled cause.

Sworn to and subscribed the 12th day of January, A. D. 1899.

[Seal of William G. McKnight, Notary Public, Cook County, Ill.]

WILLIAM G. McKNIGHT.

f In the Supreme Court of Illinois.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the ninth day of February, in the year of our Lord one thousand eight hundred and ninety-nine, a copy of the foregoing citation was lodged in my office at Springfield, Illinois.

Witness my hand and the seal of said court this ninth day of February, A. D. 1899.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

g In the Supreme Court of Illinois.

I, Christopher Mamer, clerk of the supreme court of Illinois, elected for the northern grand division, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in

obedience thereto, do hereby certify that the following pages, numbered from one (1) to (thirty-nine), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including a certified copy of the opinion of the court, as the same remain of record and on file in my said office.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affixed, at Springfield, this ninth day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

1 At a supreme court, begun and held at Springfield, on Tuesday, the fifth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Jesse J. Phillips, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Joseph N. Carter, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the sixth day of April, A. D. 1898, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the criminal court of Cook county; which said transcript is in the words and figures following, viz:

2 Be it remembered, to wit, on the 10th day of February, in the year A. D. 1898, there was filed in the office of the clerk of the criminal court of Cook county a certain transcript and appeal bond; which said transcript and appeal bond is in the words and figures following, to wit:

3 *Transcript; Jury Waived.*

STATE OF ILLINOIS, } ss:
City of Chicago, Town of South, }

Police Court, City of Chicago, First District, before George P. Foster, Esq., Justice of the Peace.

CITY OF CHICAGO }
vs.
HARRY GUNDLING. }

Debt for penalty for *in* violation of section 882 of the Revised Ordinances of the City of Chicago.

On written complaint, under oath by C. H. Skelton; warrant issued to Police Officer A. J. Rohan, returnable forthwith; war-

rant returned served by arresting above-named defendant and bringing him into court.

Case called January 11th, 1898, m.; continued to January 21st.

January 21st, case called and continued to January 26th.

Case called for trial January 26th, 1898, m., the plaintiff and defendant present in court.

Defendant pleaded not guilty, defendant first having formally executed a waiver to a jury trial in writing.

4 Witness- sworn and testified, and the court, after hearing all the evidence offered in the case and being fully advised in the premises, find the defendant guilty of selling and exposing for sale within the jurisdiction of the city of Chicago cigarettes without first obtaining a license for that purpose, in violation of section 882 of the Revised Ordinances of the City of Chicago, and doth order and adjudge that the said defendant be, and he is hereby, fined the sum of fifty dollars.

Wherefore it is ordered, considered, and adjudged by the court that the said plaintiff do have and recover of the said defendant the sum of fifty dollars, together with its costs in this behalf expended, to be taxed.

And it is further ordered by the court, in case of default or refusal on the part of the said defendant to pay said fine and costs, that Harry Gundling, the said defendant, be committed to the house of correction, there to be detained until said fine, penalty, and costs shall be fully paid and satisfied.

Provide- such imprisonment shall not exceed the period of six months from the time of his commitment, and that execution therefor —.

I certify that this transcript contains a full and perfect statement of all the proceedings before me in the above-entitled cause.

GEORGE P. FOSTER,
Justice of the Peace.

5

Fine	$50.00
Costs	1.50
	$51.50

Witnesses: C. H. Skelton, Office- A. J. Rohan, cent. station.

CHARLES F. HEALEY,
Clerk Police Court.

Know all men by these presents that Harry Gundling, as principal, and Joseph B. Moos, as surety, are held and firmly bound unto the City of Chicago in the penal sum of one hundred and three ($103.00) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 8the day of February, 1898.

The condition of the above obligation is such that whereas the said City of Chicago did, on the 26th day of January, A. D. 1898,

before George P. Foster, Esq., a justice of the peace for the said city of Chicago, recover a judgment against the above-bounden Harry Gundling for the sum of fifty ($50.00) dollars and costs, amounting to one dollar and fifty cents ($1.50), from which judgment the said Harry Gundling has taken an appeal to the criminal court of Cook county, Illinois, now, if the said Harry Gundling shall prose-
6 cute his appeal with effect and pay whatever judgment shall be rendered against him by said court upon the trial of said appeal, or by consent or in case the appeal is dismissed, or in case the matter in controversy is settled between the parties to the action without trial by the court appealed to, will pay the judgment rendered against him by said police magistrate and all costs occasioned by said appeal, then the above obligation to be void; otherwise to remain in full force and effect.

HARRY GUNDLING. [SEAL.]
JOSEPH B. MOOS. [SEAL.]

Approved by me this 9th day of February, A. D. 1898.

GEO. P. FOSTER, *J. P.*

Filed February 10th, 1898.

ERNEST MAGERSTADT, *Clerk.*

STATE OF ILLINOIS, } ss:
Cook County, }

Joseph B. Moos, being duly sworn, deposes and says that he is the person who signed the appeal bond of Harry Gundling in the case in which said Gundling was fined fifty ($50.00) dollars and costs by Justice George P. Foster, of the Harrison Street police station, on the 26th day of January, A. D. 1898.

Affiant further says that he is worth the sum of one thousand ($1,000) dollars; that he owns in fee-simple the following-
7 described real estate, known as No. 1814 Oakdale Ave., Chicago; that said property is worth the sum of thirteen thousand dollars, and that said real estate is unincumbered.

And further affiant saith not.

JOSEPH B. MOOS.

Subscribed and sworn to before me this eighth day of Feb., A. D. 1898.

VERNE S. PEASE,
Notary Public.

[NOTARY PUBLIC.]

UNITED STATES OF AMERICA,
State of Illinois, Cook County, } *ss*:

Pleas before a brance of the criminal court of Cook county and State ——, at a term thereof begun and held at the criminal court house, in the city of Chicago, in said county, on the first Monday (being the seventh day) of February, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

Present: Honorable William G. Ewing, judge of the superior court of Cook county and *ex officio* judge of the criminal court
8 of Cook county; Charles S. Deneen, State's attorney; James Pease, sheriff of Cook county.

Attest: ERNEST J. MAGERSTADT, *Clerk.*

And afterwards, to wit, on the 5th day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

CITY OF CHICAGO
vs. } 13866. Appeal.
HARRY GUNDLING.

This day come the parties hereto, by their respective attorneys, and by agreement of all parties now here made in open court this cause is submitted to the court for trial — the intervention of a jury waived.

Thereupon the court, upon hearing the testimony of witnesses and arguments of counsel and now being fully advised in the premises, finds the defendant guilty, and assesses the fine herein at fifty dollars.

Therefore it is considered by the court that the said defendant be fined in the penal sum of fifty dollars for the benefit of the
9 said plaintiff and pay all the costs of these proceedings, and that execution issue therefor.

Thereupon the defendant, by his attorney, moves the court for a new trial in this cause; and the court, having heard the arguments of counsel and being now fully advised in the premises, doth overrule said motion and orders that said motion be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said motion the defendant, by his attorney, duly excepts.

Thereupon the defendant, by his attorney, moves the court in arrest of judgment in this cause; and the court, having heard the arguments of counsel and being now fully advised in the premises, doth overrule said motion and orders that said motion be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said motion the defendant, by his attorney, duly excepts.

To which order and judgment of the court the said defendant, by his attorney, now hereby excepts and prays an appeal to the supreme court of the State of Illinois, which is granted upon the condition that the said defendant doth within twenty days from date file an appeal bond in the penal sum of two hundred and fifty dollars, with surety to be approved by this court, and that he also doth within twenty days from date prepare and file his bill of exceptions herein.

10 And afterwards, to wit, on the 24th day of March, in the year last aforesaid, it being the term of court aforesaid, there was filed in the office of the clerk of the criminal court of Cook county a certain appeal bond; which said appeal bond is in words and figures following, to wit:

Know all men by these presents that we, Harry Gundling, as principal, and Joseph B. Moos, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto the City of Chicago in the penal sum of two hundred and fifty dollars ($250), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally and firmly, by these presents.

Witness our hands and seals this 23rd day of March, A. D. 1898.

The condition of the above obligation is such that whereas the said City of Chicago did, on the 5th day of March, A. D. 1898, in the criminal court of Cook county, in the State aforesaid, and of the February term thereof, A. D. 1898, recover a judgment against the above-bounden Harry Gundling for the sum of fifty dollars ($50.00), besides costs of suit, from which said judgment of the said criminal court of Cook county the said Harry Gundling has prayed

11 for and obtained an appeal to the supreme court of said State:

Now, therefore, if the said Harry Gundling shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

HARRY GUNDLING. [SEAL.]
J. P. MOOS. [SEAL.]

Approved:
W. G. EWING, *Judge.*

And afterwards, to wit, on the 24th day of March, in the year last aforesaid, it being the term of court aforesaid, there was filed in the office of the clerk of the criminal court of Cook county a certain bill of exceptions; which said bill of exceptions is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

Criminal Court of Cook County.

12 CITY OF CHICAGO }
vs.
HARRY GUNDLING. }

Bill of Exceptions.

Be it remembered that on the trial of this case in this term (trial by jury being waived in writing by the defendant) this cause was submitted to the court upon the following stipulation of facts:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County, February Term, A. D. 1898.

CITY OF CHICAGO }
vs. } No. 13866.
HARRY GUNDLING. }

Stipulation of Facts.

It is hereby agreed by and between the parties hereto that trial by jury be, and the same is hereby, waived and the
13 cause submitted to the trial by the court without the intervention of a jury upon the following statements of fact:

It is hereby mutually agreed that the city of Chicago is a municipal corporation organized and existing under and by virtue of an act of the General Assembly of the State of Illinois entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872; L. 1871–'2, p. 218; R. S. 1897, chap. 24; that the common council of the said city of Chicago has all the powers conferred upon the common councils of cities by the said act.

It is further agreed that on, to wit, the first day of March, A. D. 1897, the common council of the said city of Chicago passed the following ordinance:

"Be it ordained by the city council of the city of Chicago:

"SECTION 1. The mayor of the city of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the city of Chicago, in the manner following and not otherwise.

"Any person, firm or corporation desiring a license to sell cigarettes shall make written application for that purpose to the commissioner of health in which shall be described the location at which such sales are proposed to be made. Said application shall be accompanied by evidence that the applicant, if a single individual, all the members of the firm if a copartnership, and person or persons in charge of the business, if a corporation, is or are per-

sons of good character and reputation. The commissioner
14 of health shall thereupon submit to the mayor the said application with the evidence aforesaid, with his opinion as to the propriety of granting such license, and if the mayor shall be satisfied that the persons before mentioned are of good character and reputation and are suitable persons to be entrusted with the sale of cigarettes, he shall issue a license in accordance with such application, upon such applicant filing a bond payable to the city of Chicago, with at least two sureties, to be approved by the mayor, in the sum of $500, conditioned that the licensed person, form or corporation shall faithfully observe and obey all laws of the State of Illinois and ordinances of the city of Chicago now in force or which may hereafter be passed, with reference to cigarettes; provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, glycerine or sugar.

"SECTION 2. Every person, on compliance with the aforesaid requirements and the payment in advance to the city collector, at the rate of $100 per annum, shall receive a license under the corporate seal, signed by the mayor and countersigned by the clerk, which shall authorize the person, firm or corporation therein named to expose for sale, sell, or offer for sale cigarettes at the place designated in the license; provided, that no license shall be granted to sell within 200 feet of a school-house.

"SECTION 3. Every license so granted shall be at the rate of $100 per annum. The municipal year shall begin May 1st, 1897, and on May 1st of every subsequent year during the continuance of this ordinance. Provided, however, that in no case shall the
15 license extend beyond the municipal year. Such license may be issued for the unexpired portion of a municipal year, upon the payment in advance at the rate fixed by the ordinance and proof furnished by the commissioner of health to the city collector, that the applicant was not liable for license, nor were any cigarettes sold at the place of business without a license, prior to date fixed in his application.

"SECTION 4. Any license so granted may be revoked upon written notice by the mayor whenever it shall appear to his satisfaction that the party so licensed shall have violated any provisions of the laws of the State of Illinois or of any ordinance of the city of Chicago relating to cigarettes, or any condition of the bond aforesaid.

"SECTION 5. Any and all persons licensed under this ordinance or any ordinance for the sale of cigarettes shall immediately cause to be and remain posted upon some conspicuous part of the room or place where cigarettes are sold or exposed for sale, his or their license.

"SECTION 6. Any person so licensed who shall not cause such license to be and keep the same posted as required by the preceding section, or who not being licensed shall cause or permit any paper or document purporting to be a license to be or remain posted as aforesaid, shall on conviction be fined a sum of not exceeding one hundred dollars.

"SECTION 7. It shall be the duty of the commissioner of health and he is hereby authorized and empowered from time to time
16 to inspect and examine all places where cigarettes are licensed to be sold within the city of Chicago, with a view of ascertaining whether the laws of the State of Illinois and the ordinance of the city in relation to the sale of cigarettes are being complied with at such place, and it shall be his duty to cause all such laws and ordinances to be rigorously enforced; and it shall be the duty of all persons, firms or corporations licensed to sell cigarettes within the city of Chicago, upon demand of the commissioner of health, to furnish to said commissioner for *in* his inspection samples of all cigarettes sold or offered for sale by them, which samples of cigarettes shall be analyzed by or under the direction of said commissioner of health and a record of such analysis shall be made and kept in his office for the inspection of the public.

"SECTION 8. Any person who shall hereafter have or keep for sale or expose for sale or offer to sell any cigarettes at any pl-ce within the city of Chicago without having first procured the license as above provided shall be fined not less than fifty dollars and not exceeding two hundred dollars for every violation of this ordinance, and a further penalty of $25 for each and every day the person, firm or corporation persists in such violation after a conviction for the first offense.

"SECTION 9. This ordinance shall be in force from and after its passage and due publication."

That the said ordinance was duly published and approved
17 and that it has not been repealed.

It is further agreed that section 882 of the Revised Ordinances of the City of Chicago is in the words and figures the same as section 8 of the hereinbefore-mentioned ordinance.

It is further agreed that on or about the 31st day of December, A. D. 1897, the defendant, Harry Gundling, did have, keep, and expose for sale, and offered to sell, cigarettes at the northeast corner of Dearborn and Monroe streets, within the city of Chicago, without having first procured a license as provided in said ordinance; that said Harry Gundling was on the ninth day of Janurary, A. D. 1898, pursuant to the written complaint, under oath, by one C. H. Skelton and a warrant issued to Police Officer A. J. Rohan out of the court of George P. Foster, a justice of the peace for the city of Chicago, arrested for said act alleged to be in violation of the said ordinance, and upon the trial thereof on, to wit, the twenty-sixth day of January, A. D. 1898, was found guilty as charged and fined in the sum of fifty dollars ($50), as will by the record in this case more fully appear; that an appeal was taken from the said judgment on, to wit, the ninth day of February, A. D. 1898, to this court, as will by the record in this cause more fully appear.

Witness our hands this 5th day of March, A. D. 1898.

18 HOWARD S. TAYLOR,
Pros. Att'y for the City of Chicago.
CHARLES H. ALDRICH,
Att'y for Harry Gundling.

Which was all the evidence offered either on behalf of the plaintiff or the defendant.

And that thereupon defendant, by his counsel, requested the court to hold each and all of the following propositions as the law of this case:

I.

That the common council of the city of Chicago had and has no power to enact the ordinance pursuant to the provisions of which this prosecution is based.

II.

That the ordinance of the city of Chicago upon which the defendant is prosecuted in this case is illegal and void.

III.

That the ordinance of the city of Chicago upon which the defendant is prosecuted is illegal and void, depriving persons of liberty and property without due process of law, in violation of the Constitution of the United States of America and of the State of Illinois.

19 IV.

That the ordinance of the city of Chicago upon which the prosecution of the defendant is based is in contravention of that provision of the Constitution of the United States which provided, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and is therefore illegal and void.

V.

That the defendant is not guilty.

But the court refused to hold these propositions and each of them as the law of this case; to which decision of the court in refusing to hold the same and each of them as the law of this case the defendant, by his counsel, then and there excepted.

And thereupon the court found the defendant guilty as charged, and assessed a fine of fifty dollars ($50.00) and costs against him.

Whereupon the defendant, by his counsel, then and there moved the court to set aside the findings so rendered and grant a new trial in this case, and filed the following reason in writing for his motion, to wit:

That the finding of the court is contrary to the law.

But the court denied the motion, and gave judgment on
20 the findings against the defendant; to which decision of the court in denying such motion the defendant, by his counsel, then and there excepted.

Whereupon the defendant, by his counsel, moved the court in arrest of judgment, and filed the following reasons in writing for his motion, to wit:

1st. That the court had no jurisdiction in this cause.

2nd. That the imposition of the said judgment in this case is in contravention of the Constitution of the State of Illinois and of the United States of America as depriving the defendant of liberty and property without due process of law, abridging his privileges and immunities as a citizen of the United States, and denying to him the equal protection of the law.

But the court denied the motion; to which decision of the court in denying such motion the defendant, by his counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made and provided, which is accordingly done this 5th day of March, A. D. 1898.

WILLIAM G. EWING, [SEAL.]
Judge Superior Court, Cook County, Illinois.

21 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Ernest J. Magerstadt, clerk of the criminal court of Cook county, in said county and State, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record in a certain cause lately pending in said court, wherein The City of Chicago were plaintiffs and Harry Gundling defendant.

Witness Ernest J. Magerstadt, clerk of said court, and the seal thereof, at Chicago, in said county, this 24th day of March, A. D. 1898.

[COURT SEAL.] ERNEST J. MAGERSTADT, *Clerk.*

In the Supreme Court of Illinois.

HARRY GUNDLING, Appellant, }
vs.
CITY OF CHICAGO, Appellee. }

22 Now comes the appellant, by Charles H. Aldrich, his attorney, and says that manifest error intervenes in this record in this, to wit:

1. That the court below erred in refusing to hold, as requested by the defendant, the following propositions as the law of this case:

I.

That the common council of the city of Chicago had and has no power to enact the ordinance pursuant to the provision of which this prosecution is based.

II.

That the ordinance of the city of Chicago upon which the defendant is prosecuted in this case is illegal and void.

III.

That the ordinance of the city of Chicago upon which the defendant is prosecuted is illegal and void, depriving persons of liberty and property without due process of law, in violation of the Constitution of the United States of America and of the State of Illinois.

IV.

That the ordinance of the city of Chicago upon which the prosecution of the defendant is based is in contravention of that provision of the Constitution of the United States which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor
23 shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and is therefore illegal and void.

V.

That the defendant is not guilty.

2. That the court below erred in refusing to hold, as requested by the defendant, that the common council of the city of Chicago had and has no power to enact the ordinance pursuant to the provisions of which this prosecution is based.

3. That the court below erred in refusing to hold, as requested by the defendant, that the ordinance of the city of Chicago upon which the defendant is prosecuted in this case is illegal and void.

4. That the court below erred in refusing to hold, as requested by the defendant, that the ordinance of the city of Chicago upon which the defendant is prosecuted is illegal and void, depriving persons of liberty and property without due process of law, in violation of the Constitution of the United States of America and of the State of Illinois.

5. That the court below erred in refusing to hold, as requested by the defendant, that the ordinance of the city of Chicago upon which the prosecution of the defendant is based is in contravention of that provision of the Constitution of the United States which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United
24 States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and is therefore illegal and void.

6. That the court below erred in refusing to hold, as requested by the defendant, that the defendant is not guilty.

7. That the court below erred in finding the defendant guilty and assessing a fine of fifty dollars ($50) and costs against him.

8. That the court below erred in overruling the motion of the defendant for a new trial.

9. That the court below erred in giving judgment on its finding against the defendant.

10. That the court below erred in overruling the motion of the defendant in arrest of judgment.

Wherefore the appellant prays that the decision of the court below in this case be in all things reversed.

CHARLES H. ALDRICH,
Attorney for Appellant.

25 And afterwards, to wit, on the 18th day of April, A. D. 1898, certain proceedings were had and orders made by said court and entered of record, among which is the following, viz:

HARRY GUNDLING
vs.
CITY OF CHICAGO. } 254. Appeal from Criminal Court, Cook County.

And now, on this day, the court, having duly considered the motion of appellant to advance this cause for hearing and being fully advised of and concerning the premises, overrules and denies said motion.

And afterwards, to wit, on the 19th day of April, A. D. 1898, certain proceedings were had and orders made by said court and entered of record, among which is the following, viz:

26 HARRY GUNDLING
vs.
CITY OF CHICAGO. } Appeal from Criminal Court, Cook.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing and the clerk of this court reporting that said cause is now ready to be taken and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

27 At a supreme court begun and held at Springfield, on Tuesday, the fourth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice;

Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the twenty-fourth day of October, A. D. 1898, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

HARRY GUNDLING *v.* CITY OF CHICAGO. } No. 254. Appeal from Criminal Court, Cook.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, and that it have execution therefor.

28 At a supreme court begun and held at Springfield, on Tuesday, the sixth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the seventh day of December, A. D. 1898, certain proceedings were had and orders made by said court and entered of record, among which is the following, viz:

HARRY GUNDLING *vs.* CITY OF CHICAGO. } 254. Appeal from Criminal Court, Cook County.

Now, on this day, this cause coming on to be heard upon the petition of the appellant for a rehearing herein and the court being

now duly advised in the premises, it is considered and ordered by the court that said petition for a rehearing be overruled and denied; and it is further considered by the court that said petitioner pay the costs and charges herein taxed.

29 At a supreme court begun and held at Springfield, on Tuesday, the 4th day of October, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the 24 day of October, 1898, the opinion of the court was filed in the words and figures following, to wit:

HARRY GUNDLING *vs.* CITY OF CHICAGO. } No. 147. Appeal from Criminal Court, Cook.

30 Docket No. 254. Agenda 72. Northern Div. April, '98.

HARRY GUNDLING *v.* CITY OF CHICAGO.

Mr. Justice PHILLIPS delivered the opinion of the court:

This case was tried on an agreed statement of facts, which showed that the city of Chicago, by its city council, adopted an ordinance which provides by section 1 that the mayor shall, from time to time, grant licenses authorizing the sale of cigarettes. It further provides what formalities shall be observed by the applicant in making his application, such as a bond to obey the laws, affidavit of good character and reputation, etc., and gives to the mayor a discretion to determine whether a license shall be issued. Section 2 provides for a license fee of $100 per year, and that no license shall be granted to sell cigarettes within two hundred feet of a school-house. Section 3 provides that every license granted shall be at the rate of $100 per year. Section 4 grants the power to the mayor to revoke any license for cause. Sections 5 and 6 provide the manner of selling cigarettes. Section 7 makes the commissioner of health the general supervisor and inspector to see that the sale of cigarettes is carried on according to law. Section 8 prescribes the penalty for the violation of the terms of the ordinance. Section 9 is, that the ordinance shall be in force after its due passage and publication. The statement further shows that appellant, on or about the 31st day of December, 1897, while said ordinance was in force and after the same

had been duly published, did have, keep and expose for sale and offer to sell cigarettes within the city of Chicago without having first procured a license, as required by said ordinance.

The defendant was convicted before a justice of the peace and a fine of $50 and costs entered against him, from which he prosecuted an appeal to the criminal court of Cook county, where, on trial on the foregoing statement of facts, he was found guilty and a fine of $50 assessed against him. Motions for a new trial and in arrest of judgment were overruled, to which he excepted, and judgment was entered against him.

The defense was based on the ground that the ordinance in question, as enacted by the city council, was not within the powers
31 delegated to the city by the legislature and hence was null and void, and that the ordinance and judgment of the court deprived the appellant of liberty and property without due process of law, in violation of the constitution of the State of Illinois and of the fourteenth amendment of the Constitution of the United States, which latter in part provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The contention of appellee is, the power to enact this ordinance is expressly granted by paragraph 50 of section 1 of article 5, chapter 24, of our Revised Statutes, which provides the common councils of cities shall have power "to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables and all other provisions, and to provide for place and manner of selling the same." The power to license and regulate the sale of cigarettes, it is contended, is included within that paragraph, and that the term "all other provisions" includes tobacco in the list of enumerated articles by the language as used.

The articles, meats, poultry, fish, butter, cheese and lard, which are expressly enumerated in the above paragraph and the power expressly given therein to regulate the sale thereof, are articles of food for man, and include by the express enumeration of articles only provisions to be used for man. The term "other provisions," by a familiar canon of construction, can extend only to articles of the same character as those specifically enumerated. When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated. (*In re* Swigert, 119 Ill., 83; Cecil *v.* Green, 161 *id.*, 265; Emmons *v.* City of Lewistown, 132 *id.*, 380.) Lexicographers have given to the term "provisions" a broader meaning than that of food for man. The meaning of general terms used in a statute, or in one section thereof, may be often determined from the connection in which the language is used and the purpose to be subserved. Paragraph 50 above, providing for the regulation of the sale of certain enumerated articles of food for man of daily consumption, followed by the general

term "all other provisions," cannot be held to include in the
32 term "all other provisions" such an article as tobacco in any of its various forms. Although it may be an article of frequent use, yet it is not included within the meaning of the term "food for man." The contention of appellant is that no express power is given to regulate the sale of tobacco by the provisions of paragraph 50. We hold that contention of appellant must be sustained, and that by paragraph 50 no power is given to the city council to regulate the sale of tobacco.

It is insisted by appellee that if no express authority for licensing the sale of cigarettes is given under paragraph 50 above quoted, the power exists as an implied power under paragraphs 53, 66 and 78 of said section 1, which provides as follows:

"Fifty-third. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions."

"Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

"Seventy-eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

An ordinance may derive its validity from several different grants of power, and not depend solely upon any single section or clause of a statute. (Kinsley *v.* City of Chicago, 124 Ill., 359.) An implied power of a municipal corporation is a power necessarily incident to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise. (People *ex rel. v.* Chicago Gas Trust Co., 130 Ill., 268; Chicago and Northwestern Railway Co. *v.* City of Chicago, 148 *id.*, 141; Mather *v.* City of Ottawa, 114 *id.*, 659.) The power to regulate the sale of an article includes the power to require a license to authorize the sale thereof. (Farwell *v.* City of Chicago, 71 Ill., 269; Chicago Packing Co. *v.* City of Chicago, 88 *id.*, 221; Kinsley *v.* City of Chicago, *supra.*) The licensing of a sale of an article is a legitimate means of regulating its sale. (Chicago Packing Co. *v.* City of Chicago, *supra.*) By the paragraphs above quoted power is expressly given the city to provide for and regulate the inspection of various enumerated articles, including tobacco, and this would include the various forms in which that product is prepared and used. The purpose of conferring this power of pro-
33 viding for and regulating the inspection of those various enumerated articles is to subserve the public welfare and protect the public health. The measure has relation to the public health and is required in that interest. With this object evidently in view the legislature passed an act approved June 15, 1887, in force July 1, 1887, entitled "An act to prohibit selling, giving or furnishing tobacco, in any of its forms, to minors, and providing a penalty therefor." Section 1 of said act provides: "That hereafter no person or persons in this State shall sell, buy for or furnish any cigar or cigarette, or tobacco in any of its forms, to any

minor under sixteen years of age, unless upon the written order of parent or guardian." Section 2 provides that if any person or persons shall violate the provisions of section 1, he, she or they shall, on conviction thereof, forfeit and pay for each offense the sum of $20. The object and purpose of this enactment were to subserve and protect the health and welfare of the class of persons to whom the act refers and to whom a sale is forbidden. The consensus of opinion in reference to the use of cigarettes is, that they are injurious to the young with immature minds, and common observation causes us to know that tobacco in the form of cigarettes is more largely used by those of young and immature minds than by any other class.

It is urged by appellant that the city council has no right to single out a particular form of manufactured tobacco and provide for its regulation, and require a license for its sale, without making the requirement apply to all the forms in which tobacco may be used. It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that particular form of tobacco. Paragraph 66 before quoted expressly authorizes the adoption of ordinances necessary to police power, and paragraph 78 is an express authorization of the city council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort and welfare of the community.
34 Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporations. Ferguson *v.* City of Selma, 43 Ala., 400.

The regulation of the police power is hardly susceptible of exact definition, as the exigencies of each case are varying, and the cases are innumerable where the health of the inhabitants of the municipality may be in some degree endangered. When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent and the consequences of neglect are more detrimental to the public good in this than in any other form of local evil. It being clear that the public health and welfare of a large class in the community would be subserved and

protected by ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by paragraphs 66 and 78. An ordinance of this character is not in conflict with any principle of the common law or with any public or general statute, and infringes no private right not necessarily infringed in the interests of good government. It subserves the public welfare, protects the health of the community, and is included within the express powers granted the city council. The ordinance was not void.

Neither did the ordinance and the judgment of the court deprive the appellant of liberty or property without due process of law. The city having the authority to enact the ordinance and provide a penalty for its violation, which ordinance applies to all citizens within the community, no principle of the constitution of the State of Illinois or of the United States, or the amendments thereto, was violated.

Appellant insists that the ordinance is void because it delegates to the mayor the power to determine whether the license should be granted. In Swarth *v.* People, 109 Ill., 621, it was said (p. 626): "It is true, the ordinance prescribing the duties of the mayor in issuing licenses says that he shall, under certain circumstances, 'grant' licenses to certain persons, while the statute authority to 'grant' such licenses is given only to the city council; but the substance of the ordinance is that the city council grants licenses to a certain class of persons upon certain conditions by authorizing the mayor to 'grant'—that is, to issue—or cause license to be issued when the conditions are complied with. This is not a delegation to the mayor of the power of the council. We see no objection to the form in which this power of the council is exercised or the mode in which the license was issued." The ordinance, by its terms, fixes the rate per annum to be charged for a license, and regulates the price and object of sale of the particular article to which it refers, all of which is enacted by the city council. That license is to be granted or issued by the mayor, and thus carrying out the express will of the city council as to issuing the license is not exercising a power conferred on the city council, but is a method by which the council exercises its power as to the manner in which the license is to be issued. In this there is no delegation to the mayor of the power of the city council. The appellant, however, is not in a position to raise this question, from the facts appearing in this record. He was not an applicant for a license, which had been refused him, but was before the court admitting that he had violated an ordinance of the city of Chicago duly passed and published, and denying the right of the city to adopt such ordinance regulating the sale of cigarettes. He is not in a position to invoke the judgment of this court as to his right to a license, nor is that question before us.

We are of the opinion that the ordinance was within the express powers granted to the city council, and the judgment of the court

was not violative of any provision of the State or Federal constitution.

The judgment of the criminal court of Cook county is affirmed.

Judgment affirmed.

36 STATE OF ILLINOIS, } ss:
Supreme Court, }

I, Christopher Mamer, elected clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above-entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, Oct. 24, 1898.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

C. MAMER,
Clerk of the Supreme Court.

[Endorsed:] Cigarette licenses. Opinion in Gundling *v.* Chicago.

37 Supreme Court of the United States.

HARRY GUNDLING }
—
CITY OF CHICAGO. }

Petition for Writ of Error.

And now comes Harry Gundling, plaintiff herein, and says that on or about the 24th day of October, A. D. 1898, this court entered judgment herein in favor of the defendant and against the plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear in the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

CHARLES H. ALDRICH,
Attorney for Plaintiff.

(Endorsed:) "Filed Feb. 9, 1899. C. Mamer, clerk."

38 And afterwards, to wit, on the 9th day of February, A. D. 1899, there was filed in the office of the clerk of said court a

certain bond; which said bond is in the words and figures as follows, viz:

Know all men by these presents that we, Harry Gundling, as principal, and Joseph B. Moos, as surety, are held and firmly bound unto the City of Chicago in the *the* full and just sum of two hundred and fifty dollars ($250), to be paid to the said City of Chicago or its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a supreme court of the State of Illinois, in a suit depending in said court between Harry Gundling and the City of Chicago, a judgment was rendered against the said Harry Gundling, and the said Harry Gundling having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Chicago, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Harry Gundling shall prosecute the writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HARRY GUNDLING. [SEAL.]
JOSEPH B. MOOS. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved:
H. B. BROWN,
Associate Justice of the Supreme Court U. S.

39 STATE OF ILLINOIS, } ss:
Cook County, }

Joseph B. Moos, being duly sworn, deposes and says that he is the person who signed the bond of Harry Gundling as surety in the case in the supreme court in which Harry Gundling is plaintiff in error and The City of Chicago is defendant in error.

Affiant further says that he is worth the sum of five hundred dollars ($500), and that he owns in fee-simple the following-described real estate known as house and lot No. 1814 Oakdale Ave., Chicago: The east 25 feet of lot 15, in Homewood, sec. 28, T. 40, R. 14; that said property is worth the sum of thirteen thousand dollars ($3,000.00); that said real estate is unincumbered.

And further affiant saith not.

JOSEPH B. MOOS.

Subscribed and sworn to before me this 31st day of December, A. D. 1898.

WILLIAM G. McKNIGHT,
Notary Public.

[SEAL.]

40 In the Supreme Court of the United States.

HARRY GUNDLING, Plaintiff in Error,
vs.
CITY OF CHICAGO, Defendant in Error.

On Writ of Error to the Supreme Court of the State of Illinois.

Assignment of Errors.

And now comes Harry Gundling, plaintiff in error, and says that manifest errors appear in the record herein in this, to wit:

1. The court erred in holding that the ordinance of the city of Chicago set out in the record, and for a violation of which the plaintiff in error was convicted, was authorized by the act authorizing municipal corporations in the State of Illinois—

"Fifty-third. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions."

"Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

"Seventy-eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

or all of these, and that consequently the plaintiff in error was not, by reason of the conviction set out in the record, deprived
41 of liberty or property without due process of law, in violation of the Constitution of the United States.

2. That the court below erred in holding that the ordinance set out in the record was an authorized exercise of municipal power, and that the defendant could therefore rightfully be prosecuted thereunder for a violation of its provisions, and that such prosecution and conviction did not deprive the plaintiff in error, as claimed by him in the trial court and in the supreme court of the State of Illinois, of rights guaranteed to him under the Constitution of the United States and the fourteenth amendment thereof.

3. That the court below erred in holding that the ordinance set out in the record was not unconstitutional under the fourteenth amendment of the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

For all of which errors the plaintiff in error prays that the judgment and decree of the said supreme court of the State of Illinois may be in all respects reversed and held for naught.

CHARLES H. ALDRICH,
Attorney for Plaintiff in Error.

Endorsed on cover: File No., 17,295. Illinois supreme court. Term No., 209. Harry Gundling, plaintiff in error, *vs.* The City of Chicago. Filed February 17th, 1899.

No. [illegible]

Box [illegible]

Supreme Court of the United States

OCTOBER TERM, A. D. 19[illegible]

No. [illegible]

HARRY SCHIRING,
Plaintiff in Error,

vs.

CITY OF CHICAGO,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

[illegible]
[illegible]
[illegible]
Attorneys for Plaintiff in Error.

[illegible]

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 209.

HARRY GUNDLING,
Plaintiff in Error,

vs.

CITY OF CHICAGO,
Defendant in Error.

Statement of Facts.

This action was originally brought before a Justice of the Peace of the City of Chicago to recover a penalty upon a charge that the plaintiff in error did on or about the 31st day of December, A. D. 1897, have, keep and expose for sale and offer to sell cigarettes within the City of Chicago without having first procured a license for that purpose, in violation of an ordinance of said City of Chicago regulating the sale of cigarettes. The plaintiff in error was found guilty as charged and fined $50 and costs. An appeal was taken to the Criminal Court of Cook County, Illinois, where, on March 5, 1898, the case was tried *de novo*, resulting in the same judgment as that obtained in the magistrate's court. Upon appeal this judgment was affirmed by the Supreme Court of the State of Illinois, whereupon the

plaintiff in error sued out a writ of error in this court directed to the Supreme Court of the State of Illinois.

The ordinance, pursuant to the provisions of which the plaintiff in error was prosecuted, was enacted by the Common Council of Chicago March 1st, 1897, and is in full as follows:

> "*Be it ordained by the City Council of the City of Chicago:*
>
> "SECTION 1. The Mayor of the City of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the City of Chicago, in the manner following, and not otherwise.
>
> "Any person, firm or corporation desiring a license to sell cigarettes shall make written application for that purpose to the Commissioner of Health in which shall be described the location at which such sales are proposed to be made. Said application shall be accompanied by evidence that the applicant, if a single individual, all the members of the firm if a co-partnership, and person or persons in charge of the business, if a corporation, is or are persons of good character and reputation. The Commissioner of Health shall thereupon submit to the Mayor the said application with the evidence aforesaid, with his opinion as to the propriety of granting such license and if the Mayor shall be satisfied that the persons before mentioned are of good character and reputation and are suitable persons to be entrusted with the sale of cigarettes he shall issue a license in accordance with such application, upon such applicant filing a bond payable to the City of Chicago, with at least two sureties to be approved by the Mayor in the sum of $500, conditioned that the licensed person, firm or corporation shall faithfully observe and obey all laws of the State of Illinois and ordinances of the City of Chicago, now in force or which may hereafter be passed, with reference to cigarettes; provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, glycerine or sugar.
>
> "SECTION 2. Every person, on compliance with

the aforesaid requirements and the payment in advance to the City Collector, at the rate of $100 per annum, shall receive a license under the corporate seal, signed by the Mayor, and countersigned by the Clerk, which shall authorize the person, firm or corporation therein named to expose for sale, sell or offer for sale cigarettes at the place designated in the license, provided, that no license shall be granted to sell within 200 feet of a school house.

"SECTION 3. Every license so granted shall be at the rate of $100 per annum. The municipal year shall begin May 1st, 1897, and on May 1st of every subsequent year during the continuance of this ordinance. Provided, however, that in no case shall the license extend beyond the municipal year. Such license may be issued for the unexpired portion of a municipal year, upon the payment in advance at the rate fixed by the ordinance and proof furnished by the Commissioner of Health to the City Collector, that the applicant was not liable for license nor were any cigarettes sold at the place of business without a license, prior to date fixed in the application.

"SECTION 4. Any license so granted may be revoked upon written notice by the Mayor whenever it shall appear to his satisfaction that the party so licensed shall have violated any provisions of the Laws of the State of Illinois or of any ordinance of the City of Chicago relating to cigarettes, or any condition of the bond aforesaid.

"SECTION 5. Any and all persons licensed under this ordinance or any ordinance for the sale of cigarettes shall immediately cause to be and remain posted upon some conspicuous part of the room or place where cigarettes are sold or exposed for sale, his or their license.

"SECTION 6. Any person so licensed who shall not cause such license to be and keep the same posted as required by the preceding section, or who not being licensed shall cause or permit any paper or document purporting to be a license to be or remain posted as aforesaid, shall on conviction be fined a sum of not exceeding One hundred dollars.

"SECTION 7. It shall be the duty of the Commis-

sioner of Health, and he is hereby authorized and empowered from time to time to inspect and examine all places where cigarettes are licensed to be sold within the City of Chicago with a view of ascertaining whether the laws of the State of Illinois and the ordinance of the City in relation to the sale of cigarettes are being complied with at such place and it shall be his duty to cause all such laws and ordinances to be rigorously inforced; and it shall be the duty of all persons, firms or corporations licensed to sell cigarettes within the City of Chicago upon demand of the Commissioner of Health, to furnish to said Commissioner for his inspection samples of all cigarettes sold or offered for sale by them, which samples of cigarettes shall be analyzed by or under the direction of said Commissioner of Health and a record of such analysis shall be made and kept in his office for the inspection of the public.

"SECTION 8. Any person who shall hereafter have or keep for sale or expose for sale or offer to sell any cigarettes at any place within the City of Chicago without having first procured the license as above provided, shall be fined not less than Fifty dollars and not exceeding Two Hundred dollars for every violation of this ordinance and a further penalty of $25 for each and every day the person, firm or corporation persists in such violation after a conviction for the first offense.

"SECTION 9. This ordinance shall be in force from and after its passage and due publication." (Record, 8, 9, 10.)

The case was tried upon an agreed statement of facts (Record, page 8), setting out, in substance, that the City of Chicago was and is a municipal corporation, organized and existing under the general act relating to the incorporation of cities and villages; that the foregoing ordinance was enacted on March 1st, 1897, and has not been repealed, and that the plaintiff in error did, on or about the 31st day of December, A. D. 1897, have, keep and expose for sale and

offer to sell cigarettes, within the City of Chicago, without having first procured a license for that purpose.

The plaintiff in error contended that he was not guilty, for the reason that the aforesaid ordinance was null and void, and asked the Criminal Court to hold each and all of the following propositions of law as the law of this case (Record, page 11):

I.

That the Common Council of the City of Chicago had and has no power to enact the ordinance pursuant to the provisions of which this prosecution is based.

II.

That the ordinance of the City of Chicago upon which the defendant is prosecuted in this case is illegal and void.

III.

That the ordinance of the City of Chicago upon which the defendant is prosecuted is illegal and void, depriving persons of liberty and property without due process of law, in violation of the constitution of the United States of America and the State of Illinois.

IV.

That the ordinance of the City of Chicago upon which the prosecution of the defendant is based is in contravention of that provision of the constitution of the United States which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and is therefore illegal and void.

V.

That the defendant is not guilty.

This the Criminal Court refused to do and upon appeal the appellant properly assigned error thereon as well as upon the other exceptions reserved in the record. (Record, page 12.)

It was contended in the state courts that the general act of the State of Illinois under which the City of Chicago is incorporated did not grant to the city the power to license or regulate the sale of cigarettes, and that, therefore, the ordinance was illegal and void. In this contention the plaintiff in error was not sustained by the Supreme Court, but, on the other hand, it was decided that the general incorporation act authorized the city to impose the license. *Gundling* v. *Chicago*, 176 Ill., 340. This decision by the state court as to this point is final and is not subject to review by this court. The ordinance, however, was questioned upon the other grounds alleged in the assignments of error and the decision upon those was rendered adverse to the plaintiff in error.

Our contentions in this court are narrowed to the questions: First, as to whether the state itself, acting through the Common Council of the City of Chicago, is not inhibited by the Federal Constitution from making those provisions in the ordinance which delegates to the Mayor the entire subject of granting and revoking licenses to persons engaged in the business of selling cigarettes; second, as to whether the ordinance is unconstitutional and void as being an unreasonable exercise of the police power by imposing a license fee of $100, a sum manifestly greater than the expense of issuing the license and providing for the regulation, thereby depriving persons of their liberty and property by an interference with their rights which is

neither necessary to the protection of others nor the public health.

The Supreme Court of Illinois in its opinion did not challenge the well-recognized principle that a power requiring the exercise of a discretion judicial in its nature cannot be delegated by a body to whom it is committed by the supreme authority, but evaded the result of that principle by assuming that there was no delegation to the Mayor of the power of the City Council. Their position is sustained by neither precedent nor authoritty, as the delegation in the ordinance in question is in its simplest form. Section 1 of the ordinance provides that the "Mayor of the City of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the City of Chicago," and that "if the Mayor shall be satisfied that the persons" applying for a license "are suitable persons to be entrusted with the sale of cigarettes, he shall issue a license . . . upon such applicant filing a bond payable to the City of Chicago with at least two sureties approved by the Mayor in the sum of five hundred dollars ($500) conditioned that the licensed person, firm or corporation shall faithfully observe and obey all laws of the State of Illinois and ordinances of the City of Chicago now in force or which may hereafter be passed with reference to cigarettes." Section 4 provides that any "license so granted may be revoked upon written notice by the Mayor whenever it shall appear to his satisfaction that the party so licensed shall have violated any provisions of the laws of the State of Illinois or of any ordinances of the City of Chicago relating to cigarettes or any conditions of the bond aforesaid," thus giving the Mayor the power to convict a licensee of a misdemeanor under the statutes of the State of Illinois relating to the sale of cigarettes (Revised Statutes of the State of Illinois, Chap. 38, Sec. 207, *h*, *i*),

and of violating the provision of the ordinance requiring the license to remain posted upon some conspicuous part of the room or place where the cigarettes are sold, for which a fine not exceeding $100 is imposed (Sections 5 and 6) without a trial by jury, without a right to appeal, and with no remedy against the Mayor for unjust or arbitrary exercise of the powers conferred by the ordinance.

Thus the whole subject of granting or revoking licenses of cigarette dealers is committed to the arbitrary and final discretion of the Mayor. Hence we contend that the plaintiff in error is restrained of his liberty and divested of his property without due process of law in direct contravention to the constitution of the United States and in direct conflict with the immemorial usages and practices of the people of Illinois; that the plaintiff in error is denied equal protection of the law in this, that in other businesses where licenses are granted, as for example the liquor business, the policy has been strictly enforced not to allow such a delegation. One tradesman or craftsman is not to be singled out and subjected to the absolute supervision of an irresponsible magistrate while his neighbor is protected in his right by the customary safeguards of the law.

And further, that even had the council the power to license and regulate the sale of cigarettes, the ordinance, by prescribing a fee of $100 as a condition precedent to that right, unjustly deprives the plaintiff in error of his liberty and property in a business which he has a natural right to follow and in a manner which is unnecessary and unreasonable to foster the general welfare of the community.

Or in other words, the ordinance is void; first, because it vests arbitrary discretionary power in the Mayor; and second, because its provisions are beyond any reasonable necessities of police regulation.

These points are presented by the second and third assignments of error (Record, 23), which are as follows:

> "2. That the court below erred in holding that the ordinance set out in the record was an authorized exercise of municipal power and that the defendant could therefore rightfully be prosecuted thereunder for a violation of its provisions, and that such prosecution and conviction did not deprive the plaintiff in error, as claimed by him in the trial court and in the Supreme Court of the State of Illinois, of rights guaranteed to him under the constitution of the United States and the fourteenth amendment thereof.
>
> "3. That the court below erred in holding that the ordinance set out in the record was not unconstitutional under the fourteenth amendment of the Constitution of the United States, which provides that: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

BRIEF.

I.

The ordinance vests arbitrary and discretionary authority in the Mayor, and is therefore void.

The ordinance in express words provides that "the *Mayor* of Chicago shall from time to time *grant* licenses authorizing the sale of cigarettes within the city of Chicago" (Record, page 8); that "*If the Mayor shall be satisfied* that the persons applying for license are of good character and reputation and *are suitable persons to be entrusted with the sale of cigarettes* he shall *issue* the license upon the applicant filing a bond conditioned that he" (the licensee) "shall faithfully observe and obey all the laws of the State of Illinois and ordinances of the City of Chicago . . . with reference to cigarettes." (Record, page 9.)

Section 4 provides that "any license so granted may be revoked upon written notice *by the Mayor* whenever it shall appear *to his satisfaction* that the party so licensed shall have violated any provisions of the laws of Illinois, or of any ordinance of the City of Chicago relating to cigarettes, or any conditions of the bond aforesaid."

The majority of the judges of the Supreme Court of Illinois held that the subject of *granting licenses* for the sale of cigarettes is not delegated by the ordinance, but that the City Council really grants while the *Mayor merely issues the license.* (176 Ill., 340, 350.)

The opinion, however, carefully avoids any statement of the terms of the ordinance as above referred to, and merely states that "the ordinance by its terms fixes the rate per annum to be charged for a license," and then says: "In this there is no delegation to the Mayor."

The court overlooked the provision of the ordinance investing the Mayor with authority to hear and determine the qualification of the person, the desirability of the location of sale, and the propriety of granting the license. It must have forgotten that the Mayor is invested with authority to revoke a license: *First,* if the licensee shall have violated any of the laws of Illinois relating to cigarettes;* *second,* if he shall have violated any ordinance of the City of Chicago in reference to cigarettes; and, *third,* if he shall have violated any condition of the bond aforesaid. This is no mere discretion to prefer charges and make preliminary findings which shall be reviewed by the Council, or to institute a prosecution which may ultimately find its way into a court. The Mayor, and he alone, decides the question as to how long the license is to be held by the licensee. His decision is final and is not reviewable by the courts. The right and privilege of pursuing the usual avocation of the dealer depends upon the state of mind of the Mayor, with no safeguard or immunity for the abuse of the power. He may revoke the license upon such evidence as satisfies him, so that the granting of the license as well as the continuation of the business depends entirely upon the decision and discretion of the Mayor without any provision for appeal or consultation with the common council of the City of Chicago. The Mayor is the Alpha and Omega. With him and upon his discretion rests the right of the individual to continue his business.

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* This court takes judicial notice of "an act to prohibit selling, giving or furnishing tobacco in any of its forms to minors, an providing a penalty therefor," which provides "that hereafter no person or persons in this state shall sell, buy for, or furnish any cigar or cigarette, or tobacco in any of its forms, to any minor under sixteen years of age, unless upon the written order of parent or guardian," under penalty of twenty dollars fine for each and every offense.

R. S. 1897, Chap. 38, Sec. 207 h, 207 i.

The case of *East St. Louis* v. *Wehrung*, 50 Ill., 28, hereafter referred to and quoted, establishes our contention that the powers conferred upon the Mayor are illegally delegated.

This case was followed by Mr. Justice Breese in *Kinmundy* v. *Mahan*, 72 Ill., 462, and Mr. Justice Baker in *Chicago* v. *Trotter*, 136 Ill., 430, declared the principle.

See, also:

Carr v. *People*, 166 Ill., 126.

Bradford v. *Pontiac*, 165 Ill., 612.

In the case of *Cairo* v. *Coleman*, 53 Ill. App., 680, the court, in holding that an ordinance providing for the inspection of merchandise and making the city marshal the inspector by virtue of his office, and providing that if, upon inspection, he discovers in such stock any articles, the sale of which shall be injurious to the health or public welfare of the citizens, or a fraud upon the public, such articles shall be reported by him to the city clerk as not having passed inspection, is void for the reason that it delegates to the city marshal the power to determine what articles of merchandise, if sold, will be injurious to the health or public welfare of the citizens or a fraud upon the public, said:

> "There would be no stability in such a regulation. Citizens engaged in legitimate business would be subject to the whims and caprice of each city marshal. The best and most intelligent of men frequently differ on such subjects. The determination of one city marshal as to what was injurious would be no criterion for the determination of another. If the power existed to inspect all merchandise, merchants would have the right to know by fixed law what was placed under the ban of official power. Any other course would be oppressive and intolerable. In such case, the power to determine what was injurious would rest in the council and not its agents."

In the case of *In re Elliott,* 11 Manitoba, 358, the following is found in the opinion:

> "The inspection of dairies, etc., is purely ministerial work, and may, of course, be performed by the officials employed by the council for that purpose. But this section hands over to the health officer a duty that is more than ministerial. It authorizes him to direct the issue of a license without any report of the result of the inspection, or any further reference to the council; and an official is thus enabled arbitrarily to decide whether an applicant is to receive a license or not. This, it seems to me, is a delegation of authority that cannot be justified; for the council has really delegated to an official the judgment and discretion that the Legislature intended and expected that it would exercise itself. It is manifest that such a delegation of authority might result in injustice and hardship; and I think that this provision of the section must be held to be illegal. *Reg* v. *Webster,* 16 O. R., 187; *Hitchcock* v. *Galveston,* 96 U. S. R., 341."

Counsel endeavored to distinguish these cases, and especially the Illinois cases. The cases cited in support of their contention were those construing ordinances, none of which give to the Mayor a discretion. In none of them is there found the statement that "if the Mayor shall be satisfied that the persons . . . are suitable persons to be entrusted with the sale of cigarettes, he shall issue a license." They all provide merely that he shall determine whether or not certain prerequisite conditions have been complied with. He has no discretion, but is to perform a ministerial function. But in the case at bar, the Mayor may think a person unsuitable to be entrusted with the sale of cigarettes without regard to his character or reputation, and in his discretion deny the license. He may use his discretion as a political weapon or to gratify his animosities or preju-

dices. He may revoke the license for the same reason and with impunity because there is no legal remedy. The Mayor may determine the condition upon which the license may be issued and upon which it may be refused. Such delegation is within the inhibition of the provisions of the Fourteenth Amendment to the Federal Constitution:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction equal protection of the laws."

Among the privileges and immunities of citizens of the United States which, perhaps, are embraced in the broader word liberty, is the protection against the arbitrary exercise of public authority, the leaving to uncontrolled, arbitrary, unreviewable discretion of one man the rights of another, except in so far as express provisions of the constitution, or immemorial usage, or what is called the common law, sanctions the control by public officers of the business and affairs of private individuals, or the use of public places by individuals.

The first fundamental principle of the constitution is the equality of the citizens; the second that no power is to be exercised but by delegation according to the course of the constitution construed in the light of the common law.

> "The liberty mentioned in the Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties: to be free to use them in all lawful ways: to live and work where he will: to earn his livelihood by any lawful calling: to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his

carrying out to a successful conclusion the purposes above mentioned.

"It was said by Mr. Justice Bradley, in *Butchers' Union Company* v. *Crescent City Company*, 111 U. S., 746, 762, in the course of his concurring opinion in that case, that 'The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights: that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty: for it takes from him the freedom of adopting and following the pursuit which he prefers: which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."

Allgeyer v. *Louisiana*, 165 U. S., 578, 589.

What restrictions have been sanctioned upon the freedom of individuals to conduct their lawful callings?

We must all admit that the unrestrained freedom of the individual is not that which is termed civil liberty, but that each man's will and whim must in some measure yield to the general good, but that no man's right shall be held on the frail tenure of another man's whim or will, and that the general good is in nothing more concerned than in pro-

tecting the individual in his enjoyment of life, liberty and property.

Orient Ins. Co. v.*Dagge*, 172 U. S., 557.

Wyneheimer v. *Peo*, 13 N. Y., 378, quoting 1 Blk. Com., 139.

"In *Loan Association* v. *Topeka*, 20 Wall., 655, 663, Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the state, and that a government by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was after all but a despotism, said: 'The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Chicago, Burlington, etc., R'd. v. *Chicago*, 166 U. S., 226-37.

The underlying principle of our local municipal government is the administration of local affairs, except in a few well-understood instances, by a common council, chosen by the people of the locality. To such a common council immemorial usage permits the delegation by the general assembly of much of the legislative power which the legislature might itself exercise.

We said, except in a few well-understood instances, and we desire to direct attention to the fact that the practice of delegating which is now universally followed was originally regarded as an exception to the general rule of non-delegation.

Immemorial custom and usage in England and America have sanctioned the delegation of a broad discretion in special boards in relation to the imposition and collection of the revenue, and likewise in reference to the supervision of the highways in towns, the streets, the public parks and commons in more populated districts.

The public or common places are the property of the public, and these constitute well-established exceptions to the general principle we are invoking, but these exceptions do not impinge or touch the rights involved in the present contention. The one relates to the property rights of the people, the other to the property of the individual.

So long have the habits and customs of the people in regard to the matters above referred to been established that it is frequently spoken of as a part of due process of law, or as of common right, or as according to common law.

In incorporated cities this common council or legislative body is the body on whose discretion the general assembly of the state and the body of the people of the local community rely for a faithful and wise administration of their affairs.

That we are not attaching too much importance to immemorial usage as one of the criteria of due process of law, and also that delegation where sanctioned is an exception to the general rule, is abundantly supported by authority.

In a California case where the power to delegate was denied an argument was advanced that the legislature was constantly delegating legislative authority to township and municipal officers. To this argument the court replied as follows:

> "In the third place, it is said that the legislative power is delegated to counties, towns, cities, and villages. But these instances of local legislatures are referred to by the same authors and judges, who have

> maintained as a fundamental maxim, that the power to make laws cannot be delegated by the State Legislature. A system of local governments and municipal corporations existed in England from the earliest times, was adopted by the first settlers in America, and has never been supplanted. Some such system seems to have entered into every plan of free government entertained by our countrymen; and it is very properly assumed that such a system was in contemplation by those who framed the constitutions of the several states. 'The right of the Legislature, in the entire absence of authorization, or prohibition, to create towns or other inferior municipal corporations, and especially of local taxation and police regulation *usual with such corporations,* has always passed unchallenged The Legislature, in these cases, is not regarded as delegating its authority, because the regulation of such local affairs as *are commonly left to local boards* and officers is not understood to belong properly to the State.' Cooley Const. Lim. 189-190."
>
> *Houghton* v. *Austin,* 47 Cal., 644-55.

And Judge Cooley says, speaking of the maxim that the legislative power must not be delegated:

> " We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that the legislative power must not be delegated, *since that maxim is to be understood in the light of the immemorial practice of this country and of England,* which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority."

And as was recently said in the opinion of the Court of Appeals of the State of New York, *Rathbone* v. *Wirth*, 150 N. Y., 459:

> " What has been frequently called the political ten-

> dency of the constitution is not always to be found expressed in words, but is to be derived from acknowledged principles of government that existed long before its adoption, and are to be implied from the general language and evident purpose and scope of particular provisions."

This principle was emphatically affirmed and strictly enforced in

People v. *Hurlbut*, 24 Mich., 44.

People v. *Albertson*, 55 N. Y., 387.

The State of Connecticut for many years had no written constitution, but no one ever suggested that its people were without the protection of the great constitutional guaranties of the common law, and it has been several times held by this court that the constitution of Connecticut was the customs of the common law and the customs of the people which have arisen since the settlement of the state.

Calder v. *Bull*, 3 Dallas, 386.

Livingston v. *Moore*, 7 Peters, 469.

But we have authority higher than even the expression of the jurists above quoted. This court has enforced the principle we are contending for. In the case of *Den* v. *Hoboken Land and Improvement Co.*, 18 How., 272, inquiring into what is due process of law, the court said:

> "The article is a restraint on the legislative as well as on the executive and *judicial powers* of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles then, are we to resort to ascertain whether this process, enacted by Congress is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the

> emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

In this case they upheld summary process in a revenue case upon the ground that it accorded with immemorial usage of the English people.

The court below has inaugurated a change of policy in regard to a matter of common right.

A change in the policy inaugurated by the general legislature or any department of government, except a constitutional convention, substituting the whim or discretion of a single individual *abridges* the *privileges and immunities* of the citizen, and when by such a change the usual avocation, calling or business of the individual can be interrupted or suspended by the written notice of an individual, whether he be a Mayor or a police officer, the individual thus disturbed is deprived of his property and of his liberty without due process of law.

In no state in the Union has the policy above indicated been more thoroughly established and consistently practiced than in the State of Illinois.

Many years ago, Mr. Justice Walker announced the time-honored principles, as follows:

> "As a general rule, where power is conferred upon a municipal corporation to regulate any calling or business, they are powerless to delegate a discretionary authority to others, or to an individual. In creating such bodies, it is designed to aid the government in the preservation of good order, and to protect more effectually persons in the particular community from injuries and annoyances that cannot be so readily guarded against by the general laws of the State. And in conferring the power upon the corporate body, it is with the intention that it shall be exercised by the body created, and in the mode prescribed, and any de-

parture from such authority, or *any attempt by the body to transfer their powers to others is unwarranted.*

" The 44th section of Article III of the City charter (Private Laws, 1865, p. 349) declares that the city council shall have power to 'restrain, prohibit and suppress tippling houses, dram-shops, gaming, bawdy, and other disorderly houses.' *This provision manifestly intended that the power should be exercised by the city council, under reasonable and proper ordinances, and not that they should authorize an individual to grant or refuse a license, or* to fix the amount which should be paid for a license If the treasurer may, under this ordinance, refuse license with the concurrence of the mayor, then they, and not the city council, would regulate or suppress dram-shops; and if the treasurer may, in his discretion fix the sum to be paid, then he, and not the city council would discharge the duty.

" In the proper exercise of this power, the city council should adopt general ordinances, prescribing a general rule by which licenses might be obtained. They might, no doubt, prescribe the character of persons who might or might not obtain licenses; or they might, in their regular or called meetings, in such manner as they might ordain, grant such licenses. The ordinances should prescribe the amount required to be paid for each license, either by an ordinance relating to the entire city, or grade the rates by divisions or portions of the city, or otherwise. The ordinances should be of that general character that all persons coming within its requirements should be entitled by complying with its provision to receive a license. And the amount to be paid should be determined by ordinance or order of the council, and not left within the discretion of a single officer of the City." *The City of East St. Louis* v. *Wehrung*, 50 Ill., 28-31.

We do not understand that the Supreme Court has intended or professed to adopt a new policy, but is professing not to violate the principle of the delegation of a power legislative and judicial in its nature.

There is no conflict of authority upon what constitutes judicial discretion as distinguished from ministerial duty in so far as the same is involved in such cases. *Mississippi* v. *Johnson*, 4 Wall., 475.

In the case of *Darst* v. *People*, 51 Ill., 286, the town of Eureka adopted an ordinance declaring all intoxicating liquors kept for sale or to be given away a nuisance and directed that the police officers abate such nuisance by removing such liquors beyond the limits.

The police officers removed the liquor belonging to Darst beyond the limits of the town, but did not destroy it.

The Supreme Court in that case said:

> "The board of trustees of Eureka had no more power to authorize their police officers to perform acts of this character, than they had to authorize them at discretion to assess a fine of fifty dollars upon any man whom they might believe to keep spirits for sale, and seize his property or person for its payment, without inquiry before a court, or an opportunity of being heard in his own defense. *Such proceedings are a violation of the elementary principles of our constitution and laws, and it is unnecessary to enlarge upon this topic.*
>
> "A man's property cannot be seized except for a violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine."

In this case it is left entirely for the Mayor to say whether or not one holding a license has been guilty of violating the state law, or city ordinance, in reference to the sale of cigarettes.

To hear evidence and adjudge a penalty or forfeiture is purely a judicial power.

Poppen v. *Holmes*, 44 Ill., 360.

Darst v *People*, 51 Ill., 286.

Flint P. R. Co. v. *Woodhill*, 25 Mich., 100.

A ministerial act is one performed in a prescribed manner in obdience to the mandate of legal authority, without regard to the exercise of judgment as to the propriety of the act on the part of the party performing.

Waldo v. *Wallace*, 12 Ind., 572.

The appellant is denied the equal protection of the laws in this: The liquor dealer (and in fact the owner of any other business) is protected in his right by the time-honored principle that his rights are governed by the common council, while the cigarette dealer is left to the summary discretion of the Mayor. We have cited the decisions showing the sancity of the right of the liqour dealer and entertain the hope that our client may have the equal protection of the same principles of law.

The cigarette may not be as ancient, surely it is not so venerable, and evidently it is not in equal favor in the eye of the tribunal to which the writ of error in this case is directed, but it is recognized as a legal business and a legitimate form of vending tobacco (*Sawrie* v. *Tenn.*, 82 Fed. Rep., 615), and no argument is required that it is not entitled to the equal protection of the law.

The general principle, alike fundamental and considered by the American people an essential to the preservation of their rights and liberties, is that unlimited power and authority must not be placed in any hands without ample provision being made for control and revision, in order that the immunity of the citizen against unjust and oppressive action shall be rendered as certain as possible.

The specific rule deduced from these general principles which have become axioms of American constitutional law governing such cases is that the local legislative assembly cannot delegate to another individual, board or tribunal the exercise of what is termed judicial discretion, *i. e.*, a discretion which requires the weighing and balancing of evi-

dence and a judgment upon the character or qualification of individuals, or whether one has been guilty of violating a law or has incurred a penalty or forfeiture, but that mere ministerial duties which leave no discretion in the performance, provided certain preliminary conditions are complied with, may be so delegated.

In the present case under no condition prescribed is the Mayor obliged to issue the license. Under no condition pointed out in the ordinance would a mandamus lie, that writ being appropriate only to compel the performance of ministerial acts.

Yick Wo v. *Hopkins*, 118 U. S., 356.

It remains only to distinguish from this case certain cases where authority is sometimes given to town or city officers. The most notable is the power of supervising and regulating the use of commons, parks, streets and highways. This is distinguished upon two grounds:

First. The right to enjoy these is not a property right similar in class to the right to conduct a business.

Second. From time immemorial large powers have been given to town officers and highway supervisors over the use of the streets, the necessities of the case not permitting the slow process in the court.

In every such case the proprietary right of the state has been remarked upon as a ground of decision and particularly so in *Davis* v. *Massachusetts*, 167 U. S., 43.

II.

The ordinance is void because its provisions are beyond any reasonable necessity of police regulations.

> "The fact that a license is required to do an act is of itself a prohibition of such act without a license."
>
> *Chilvers* v. *The People*, 11 Mich., 49.
>
> *Sherman* v. *Ft. Wayne*, 127 Ind., 109.
>
> "A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and as incident to this right to labor or employ labor, make contracts in respect thereto, upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitute the essential distinction between freedom and slavery, between liberty and oppression."
>
> *State* v. *Goodwill*, 33 W. Va., 179.
>
> "The right to pursue the ordinary callings of life exists independently of government, and the pursuit of them can only be so far restrained and regulated as such restraint and regulating may be required to prevent the doing of damage to the public or to third persons."
>
> Tiedeman's Limitations of Police Power, 273.

The sum charged for a license under the ordinance in question is altogether unreasonable and wholly beyond the requirements necessary to carry out the regulations provided by the ordinance. It cost but a few cents to issue a license. The ordinance does not provide any salutary regulations directed to the general welfare of the community. Section 7 makes it the duty of the Commissioner of Health from time to time to inspect and examine all

places where cigarettes are licensed to be sold within the City of Chicago with a view of ascertaining whether the laws of the State of Illinois and the ordinance of the City of Chicago, in relation to the sale of cigarettes, are being complied with at such places. In other words, it does not make it his duty to examine or inspect all cigarettes with a view of ascertaining whether or not they are pure, or whether an attempt to defraud the public is being made, for the ordinance in no sense comes within the range of an inspection ordinance.

> "What laws may be properly classed as inspection laws must be determined largely by the nature of the inspection laws of the states at the time the constitution was framed." *People* v. *Compagnie Generale Transatlantique*, 107 U. S., 59, 67.
>
> 23 Amer. & Eng. Encyc. of Law, 311 *et seq.*

An investigation into the inspection laws of the State of Illinois will show that never in its history has a license been imposed as a means of, or as incidental to, carrying out the intention of these laws.

Reference is here had to "An Act to establish inspection within the State," approved March 23, 1819 (Session Laws 1819, page 199); "An Act establishing and regulating the inspection of tobacco in this State," in force January 12, 1829 (laws of 1833, page 339); Revised Statutes of 1845, page 286; and the present laws now in force respecting the inspection of oil and grain. These laws are in accord with *Turner* v. *Maryland*, 107 U. S., 55, where it is said:

> "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions and weight of package, mode of putting up, and marking and branding of various kinds, all of these matters being supervised by a public officer having authority to pass or not to pass the article as a lawful merchandise, as it did or did not answer the prescribed requirements."

There is not a single instance since the adoption of the federal constitution or at any time reported in all the books in which a license has been imposed either by a state or municipality as a means of regulating the inspection of an article, and is it in any sense appropriate to the exercise of the power of inspection? A license to sell cigarettes does not in the least facilitate the inspection of them. It is easy to see that the power to regulate the sale of an article implies the power to license, in order that should the seller violate the law, and show himself unfit to sell the article, his license may be revoked. But inspection laws have no reference to the person; they affect the thing. The ordinance makes it the duty of the Commissioner of Health merely to examine the places where cigarettes are sold with a view of ascertaining whether or not the licensee has caused his license to be posted upon some conspicuous part of the place where the cigarettes are sold; or to ascertain whether or not, under the Criminal Statutes of the State of Illinois, cigarettes are being sold by the licensee to minors, or to learn whether or not the person selling the cigarettes has obtained a license for that purpose. He may also in his discretion demand samples of cigarettes for inspection, but it is not made incumbent upon him to make such demand, and he may do it once a week, or once a month, or once a year, or never. In a great city like Chicago, where there are over 4,000 persons engaged in the sale of cigarettes, it is frivolous to assume that $100 is a reasonable fee. If every dealer of cigarettes in Chicago should take out a license the city would receive over $400,000, which is a sum so exorbitant to carry out the regulations of the ordinance as to justify the assumption that the members of the common council fully realized at the time of the passage of the ordinance that the cigarette busi-

ness of this country was mostly in the hands of large tobacco corporations which controlled vast wealth.

Tiedeman's Limitations of Police Power, 274, lays down the following principle:

> " In the regulation of all such occupations it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expenses of issuing the license and maintaining the police provision; that is, a reasonable sum must be determined by the facts of each case, but where it is a plain case of police regulation the courts are not inclined to be too exact in determining the expense of procuring the license as long as the sum demanded is not altogether unreasonable."

Cooley's Constitutional Limitations, 744.

Tiedeman's Limitations of Police Power, 294.

Van Gant v. *Harlem Stage Co.*, 59 Md., 330.

State v. *Hoboken*, 41 N. J. Law, 71.

City v. *Boatmen's Ins. and Trust Co.*, 47 Mo., 150.

It is neither necessary to the protection of, or conducive to, the public health or welfare to restrain the business of selling cigarettes The selling of cigarettes creates no disagreeable odors in the neighborhood in which they are sold, nor in any way detracts from the happiness or comfort of persons residing in the neighborhood. *In re* Jacobs, 98 N. Y., 98. While it is true that the excessive use of cigarettes may be injurious, yet that is not enough to justify such an unreasonable ordinance as the one in question. Tiedeman says, p. 294 of his work on limitation of police power, that:

> " It is not enough that a thing may become harmful when put to improper use; it must be itself harmful and incapable of a harmless use. Poisonous drugs are valuable when properly used, but they may work serious injury by being improperly used even to the extent of destroying life. Safeguards of every kind

> can be thrown around the use of them so that damage may not be sustained by the improper use of them, but that is the limit of the police control of the trade."

The only substantial requirements of the ordinance as far as the regulation of the sale of cigarettes is concerned are such requirements as will insure the collection of the license fee, to wit, the examination of the places where cigarettes are sold to see if the license is duly posted in a conspicuous place. Such requirements are not police in their nature, but come properly under the head of taxation. Tobacco used in a moderate degree is found a valuable and useful stimulant, and should not be made the subject of unreasonable and unjust requirements. Nor should the thousands of merchants in the outlying dstricts, where the sale of cigarettes is limited, be deprived of the right to sell the same on account of a prohibitive license fee.

Respectfully submitted,

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No. 209.
Brf. of Walker for D. E.

Office Supreme Court U.
FILED
MAR 10 1900
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Clerk

Filed Mar. 10, 1900.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 209.

HARRY GUNDLING,
Plaintiff in Error,
vs.
CITY OF CHICAGO,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

Brief and Argument for the Defendant in Error.

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In Error to the Supreme Court of the State of Illinois

Brief and Argument for the Defendant in Error.

BRIEF.

The case is not within the rule declared by this court in

Yick Wo v. *Hopkins*, 118 U. S., 356,

but is governed, as to the first point of plaintiff in error, by

Crowley v. *Christensen*, 137 U. S., 86.

See, also,

Barbier v. *Connolly*, 113 U. S., 27.
Soon Hing v. *Crowley*, 113 U. S., 703.
Dent v. *West Virginia*, 129 U. S., 114.
Powell v. *Pennsylvania*, 127 U. S., 678.

And, as to the second point of plaintiff in error, by

St. Louis v *Western Union Telegraph Co.*, 148 U. S., 92, 104.

Postal Telegraph Cable Co. v. *Baltimore*, 156 U. S., 210.

Whether the ordinance in the record really does vest arbitrary and unlimited power in the Mayor of the City of Chicago, is a question which involves only the correct interpretation of the words used in said ordinance, and that question has been decided adversely to the contention of plaintiff in error by the Supreme Court of the State of Illinois in

Gundling v. *City of Chicago*, 176 Ill., 340.

The subject matter of the ordinance being purely domestic, this court should adopt the interpretation of the Supreme Court of the State of Illinois.

McElvaine v. *Brush*, 142 U. S., 155, 160.

Morley v. *Lake Shore Railway Co.*, 146 U. S., 162, 166.

In view of the interpretation put upon the ordinance by the Supreme Court of the State of Illinois, and because of that respect which is due from this court to the officials and courts of a State, this court must presume, at least, nothing to the contrary appearing in the record, that, in proceedings under the ordinance, no unfair or unjust action will be tolerated.

Dent v. *West Virginia*, 129 U. S., 114, 124-5.

Player v. *Vere*, T. Raymond, 288, 293, 324, 326.

In re Flaherty, 105 Cal., 558.

And that presumption becomes a certainty, when the established law of the State of Illinois upon kindred subjects is known.

Illinois State Board of Dental Examiners v. *The People*, 123 Ill., 227.
Zanone v. *Mound City*, 103 Ill., 552.
The People v. *The Board of Commissioners of Cook Co.*, 176 Ill., 576, 581.
State Board of Dental Examiners v. *The People*, 20 Ill. App., 457.

As the Supreme Court of the State of Illinois decided the case upon its interpretation of the ordinance, and as its decision may be sustained upon such interpretation of the ordinance alone, and as that interpretation involves no question of a Federal nature, the case may be dismissed.

Miller's Executors v. *Swan*, 150 U. S., 132.

The sale of tobacco in the form of cigarettes is a subject-matter within the police power of a State.

Gundling v. *City of Chicago*, 176 Ill., 340.

It is not an unlawful restraint upon the fundamental right of a man to pursue a lawful calling, to require a person, desirous of pursuing the calling of selling cigarettes in the City of Chicago, to be possessed of such a character or reputation as has some natural relation to such calling.

Yick Wo v. *Hopkins*, 118 U. S., 356, 368.
Crowley v. *Christensen*, 137 U. S., 86.
Barbier v. *Connolly*, 113 U. S., 27.
Soon Hing v. *Crowley*, 113 U. S., 703.

Dent v. *West Virginia*, 129 U. S., 114.
City of Brooklyn v. *Breeslin*, 57 N. Y., 591.
People v. *Mulholland*, 82 N. Y., 324.
City of St. Louis v. *Knox*, 6 Mo. App., 247; s. c., Affd., 74 Mo., 79.
Grand Rapids v. *Braudy*, 105 Mich., 670.
Commonwealth v. *Hubley*, 172 Mass., 58.
In re John Flaherty, 105 Cal., 558.
State v. *Schoenig*, 72 Minn., 528.
In re Bickerstaff, 70 Cal., 35.
People v. *Warden*, 144 N. Y., 529.
State v. *Gardner*, 58 Ohio St., 599.
Singer v. *State*, 72 Md., 464.
State ex rel v. *Benzenberg*, 101 Wis., 172.
Player v. *Vere*, T. Raymond, 288, 324.
Shaw v. *Pope*, 2 B. & Ad., 465.

Whether a person, desirous of pursuing the calling of selling cigarettes in the City of Chicago, is, in point of fact, a fit person to be allowed to engage in such calling, may be left to the judgment of another person, or body of persons, other than a judge and jury, without invading any fundamental right of such person.

Cases last cited.

So far as appears in this record, the sum of $100 is not an unreasonable fee to exact for a license to sell cigarettes in the City of Chicago.

St. Louis v. *Western Union Telegraph Co.*, 148 U. S., 92, 104.
Van Hook v. *City of Selma*, 70 Ala., 361.
Tiedeman, Limitations of Police Power, p. 274.
Cooley, Const. Lim., Ed. 5, note on pp. 245, 614.

City of Burlington v. *Putnam Ins. Co.*,
31 Ia., 102.

And cases cited in the argument following of instances where license fees quite as high as the fees fixed by the ordinance at bar were held to be not unreasonable.

ARGUMENT.

The argument advanced on behalf of the plaintiff in error attempts to bring his case within the ruling of this court in the well-known case of *Yick Wo* v. *Hopkins*, 118 U. S., 356. But, it is respectfully submitted, the attempt cannot succeed. The case at bar is governed by the subsequent decision of this court in *Crowley* v. *Christensen*, 137 U. S., 86, where the true meaning and limitation of the ruling in *Yick Wo* v. *Hopkins* is explained and enforced. The business regulated by the ordinance of the City and County of San Francisco in *Crowley's* case was the business of selling intoxicating liquors, while the business regulated in the ordinance of the City of Chicago in the case at bar is the business of selling cigarettes. Neither business can be said to be, like the business regulated in *Yick Wo's* case, viz., the laundry business, "a business harmless "in itself and useful to the community." As pointed out in *Crowley's* case, the business of selling intoxicating liquors may be entirely prohibited by a State without violating any inhibition of the Federal constitution. While it has not been actually decided that a State may entirely prohibit the sale of cigarettes, it would appear that there can be little doubt that a State may lawfully regulate that business, and may prohibit the sale of cigarettes to very young persons, say under five years of age, or under sixteen years of age, as the State of Illinois has done. (Hurd's Rev. Stat., Ill., 1897, Ch. 38, Par. 42f.)

In *Powell* v. *Pennsylvania*, 127 U. S., 678, this court

decided that a State may lawfully prohibit the manufacture and sale of oleomargarine.

In view of the decisions of this court in *Crowley's* case, *supra*; in *Barbier* v. *Connolly*, 113 U. S., 27; *Soon Hing* v. *Crowley*, 113 U. S., 703, and *Dent* v. *West Virginia*, 129 U. S., 114, if it can be held that anything in *Yick Wo* v. *Hopkins*, *supra*, justifies an assertion that the case at bar really involves any Federal question, then any petty police regulation that a city, or village, may pass may be brought up into this court from a State court, and this court thus may be compelled to take upon itself the office of "chief of police," if the expression may be used, over all the States, and to finally decide upon matters which, from time immemorial, have been left, and safely left, to the control and discretion of local officials and assemblies.

As to the point urged on behalf of plaintiff in error, that the amount of the license fee, viz., one hundred dollars per annum, is unreasonable: So far as appears, that point was not urged at all in the Supreme Court of the State of Illinois, to which this writ of error is directed. Under the settled, and well understood, rule for deciding such a point, on this record, there is no merit in the contention of plaintiff in error, and that would appear to be settled decisively in the quite recent decisions of this court in *St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 92, 104, and *Postal Telegraph Cable Company* v. *Baltimore*, 156 U. S., 210.

I.

The first point of plaintiff in error is thus stated by him on page 10 of his argument: "The ordi-

"nance vests arbitrary and discretionary authority in "the Mayor, and is, therefore, void." Said proposition involves a premise and a conclusion. The premise, viz.: "The ordinance vests arbitrary and discretionary authority in the Mayor," obviously presents no Federal question, and the question it presents relates to, and draws in argument, only the proper *construction and interpretation* of the language used in the ordinance. This ordinance has been before the Supreme Court of the State of Illinois, and that court did not give, nor show any disposition to give, the ordinance a construction which would "leave room for the play and action of purely personal and arbitrary power" by the Mayor of the City of Chicago.

Why should this court seek to give a different construction to the ordinance? The subject-matter of the ordinance relates exclusively to a small matter of internal police. All proceedings under the ordinance must be carried on by local officers and before local courts.

The speculations of plaintiff in error (reasoning from the probable to the actual, and arguing the question of the validity of the ordinance solely upon the basis of the supposed and imaginary opportunities its terms afford for unequal and unjust discrimination in its administration and actual operation—*Yick Wo* v. *Hopkins*, 118 U. S., 356, 373) must be regarded as wholly extravagant, unfounded and unreasonable, and based upon an unwarranted assumption, that the officials and courts of the State of Illinois are either ignorant of, or will deliberately disregard, the principles upon which our government rests.

In *Dent* v. *West Virginia*, 129 U. S., 114, 124-5, involving the validity of a State statute requiring every practitioner of medicine to obtain a certificate from the

State Board of Health, this court said: "If in the pro-"ceedings under the statute, there should be any unfair "or unjust action on the part of the Board in refusing "him a certificate, we doubt not that a remedy would be "found in the courts of the State. But no such imputa-"tion can be made, for the plaintiff in error did not sub-"mit himself to the examination of the Board after it "had decided that the diploma he presented was insuf-"ficient." In other words, "respect ought to be had "to the city" of Chicago and its Mayor (for "'tis not "to be presumed when we consider what great trust he "is in already, that he should falsify it in so small a "matter" *Player* v. *Vere*, T. Raymond, 288, 293, 324, 326, involving licensing of carts in the City of London), and to the courts of the State of Illinois. "Laws are "not made upon the theory of the total depravity of "those who are elected to administer them; and the pre-"sumption is that municipal officers will not use these "small powers villainously and for purposes of oppres-"sion and mischief." (*In re Flaherty*, 105 Cal., 558, 562.) The Supreme Court of the State of Illinois has more than once ruled emphatically that the arbitrary withholding of a license from a proper applicant can be, and will be, judicially controlled and prohibited. (*The Illinois State Board of Dental Examiners* v. *The People ex rel. Cooper*, 123 Ill., 227; *Zanone* v. *Mound City*, 103 Ill., 552; *The People ex rel. Hetty H. R. Green* v. *The Board of Commissioners of Cook County*, 176 Ill., 576, 581; *Illinois State Board of Dental Examiners* v. *The People*, 20 Ill. App., 457.)

II.

A singular confusion of thought appears in the argument of plaintiff in error. He argues that the Council of the City of Chicago cannot delegate its power to license; that, in this instance, it has delegated that power to the Mayor of the city and hence the ordinance is void. And he concludes that, because power is illegally given to the Mayor, it must be arbitrary power and must be exercised arbitrarily by him. Apparently, he concedes that arbitrary power, when vested in the City Council, is, if not good in itself, at least not so objectionable as arbitrary power vested in the Mayor.

The argument for plaintiff in error seems to concede that if the words "Mayor of the City of Chicago," where they appear in the ordinance at bar, were stricken out, and the words "City Council of the City of Chicago," were substituted therefor, the ordinance would in no way conflict with any provision of the Federal constitution. If that is a correct statement of his argument, the question arises, what Federal question is before this court?

The right of the City Council of Chicago to delegate its power to license the selling of cigarettes to the Mayor of the city presents no Federal question. A delegation by a city council of power vested in it by the legislature of the State is void, not, as a rule, on any principle of constitutional law, but on that maxim of the law of agency which says, *Delegata potestas non potest delegari*. The State is the principal, and the city council is the agent, and, like every other agent, takes its power upon a personal trust and confidence, and such power must be personally exercised. (*Clark* v.

Corporation of Washington, 12 Wheaton, 40, 53-54; Dillon, Municipal Corporations, Ed. 4, § 96.) But the State may sometimes authorize its agent, the city council, to delegate powers to sub-agents, and such authority may be given expressly (*City of Brooklyn* v. *Breslin*, 57 N. Y., 591), or by implication (*Galveston* v. *Hitchcock*, 96 U. S., 341, 348).

Whether the State of Illinois has either expressly, or by implication, authorized the City Council of the City of Chicago to delegate to the Mayor of the city its power to license the sale of cigarettes, and whether the City Council has in fact made such delegation in the case at bar, are questions not before this court on this record. They are questions of purely local law, depending upon the meaning of the city charter and the ordinance at bar.

III.

Appellant concedes, and must concede, that tobacco in the form of cigarettes, is a proper subject-matter for the exercise by a State of its police power.

Does the State do any wrong, does the State deny to its citizens any fundamental right, when it says, that no person shall sell cigarettes in the City of Chicago, unless he complies with the conditions prescribed by the ordinance at bar?

One of the conditions is the possession by the applicant of "good character and reputation." "Good character and reputation" must necessarily be construed with reference to the business. A man might have a very bad character and reputation as a plumber, for example, and yet be a good enough man to sell cigarettes. "Good

character and reputation means " such a character and reputation as bear some natural relation to the calling.

It cannot be denied, and it never has been denied, that a State has the power to prescribe, that an individual who desires to follow a trade or calling, the reckless pursuit of which has a tendency to injure the lives and property of others, shall be possessed of qualifications which bear some natural relation to the trade or calling, and the possession of which affords some reasonable guaranty that the trade or calling will be practiced intelligently, and with some regard to the laws of the State and to the welfare of others. It certainly is not unreasonable to require a man who wants to sell cigarettes to have some sort of a character and reputation.

That being so, necessarily, some one must, in the first instance, decide on the character and reputation, and it would seem to be immaterial whether the power to decide the question be vested in one man, or in a body of men. A grant of power to decide such a question in the issuing of licenses has never been regarded as the giving of arbitrary power to the grantee, and, in Illinois at least, the courts have always prohibited the arbitrary exercise of such power when vested either in individuals, in boards, or in city councils.

In the ordinance at bar, an applicant for a license is required to furnish a bond in the sum of $500, "with at least two sureties to be approved by the Mayor." There is quite as much opportunity for the exercise of arbitrary power in passing upon the sufficiency of proposed sureties on a bond as there is in passing upon the character of an applicant for a license, yet no complaint is made of this part of the ordinance.

Plaintiff in error cites no precedent where an ordinance, or a statute, vesting no more authority and discretion in an official, or in a board, or in an assembly, than does the ordinance in the case at bar, has been construed as a vesting of arbitrary and unlimited power. Indeed, it is very common and usual, and always has been, in regulating the granting of licenses, to prescribe, that the applicant shall be a fit person, and to submit the fact of fitness to the judgment of an official, or of a board.

In *Yick Wo* v. *Hopkins*, 118 U. S., 356, this court said (p. 368): "The ordinance, therefore, also differs from "the not unusual case where discretion is lodged by law "in public officers or bodies to grant or withhold licenses "to keep taverns or places for the sale of spirituous liq- "uors and the like, where one of the conditions is that "the applicant shall be a fit person for the exercise of "the privilege, because in such cases the fact of fit- "ness is submitted to the judgment of the officers and "calls for the exercise of a discretion of a judicial nat- "ure."

In *City of Brooklyn* v. *Breslin*, 57 N. Y., 591, an ordinance of the common council of the City of Brooklyn provided that the mayor might grant licenses to such persons as he may deem proper, of the age of twenty-one years and of good moral character, and not otherwise, to carry on the business or trade, or to act in the capacity, of coachmen, porters, owners and drivers of hacks, junk wagons or carts and of common carriers, and the ordinance was held to be valid.

In *People* v *Mulholland*, 82 N. Y., 324, an ordinance provided that the mayor might grant licenses to sell milk in the city to such persons as in his judgment shall appear proper, and it was held valid.

In *City of St. Louis* v. *Knox*, 6 Mo. App., 247 (affirmed in 74 Mo., 79), an ordinance of the City of St. Louis provided that no license should be granted to a horse or cattle dealer without a certificate from the board of police commissioners that the applicant is of good moral character, and it was held valid.

In *Grand Rapids* v. *Braudy*, 105 Mich., 670, an ordinance provided that persons desiring to go into the business of pawnbroking, junk dealing, or dealing in second-hand goods, must present an application in writing, signed by at least twelve freeholders of good reputation, certifying to the good reputation, fair fame, and moral character of the applicant or applicants. The ordinance was held valid.

And in each and all of the following cases the validity of city ordinances leaving to officials more or less discretion as to the fitness of persons for certain callings was involved, and in each and all of them the ordinances were sustained:

Commonwealth v. *Hubley*, 172 Mass., 58.
In re John Flaherty, 105 Cal., 558.
State v. *Schoenig*, 72 Minn., 528.
In re Bickerstaff, 70 Cal., 35.

See, also,

Player v. *Vere*, Sir T. Raymond Reports, 288, 324.
Shaw v. *Pope*, 2 B. & Ad., 465.

This court is familiar with the decisions holding that a State has the power to prescribe that a man must possess certain qualifications in order to go into the business of plumbing, and to leave the fact of the possession of such qualifications to the judgment of boards of examiners.

See

People v. *Warden*, 144 N. Y., 529.
State v. *Gardner*, 58 Oh. St., 599.
Singer v. *State*, 72 Md., 464.
State ex rel. v. *Benzenberg*, 101 Wis , 172.

In all of said cases it appears that more or less power was vested in boards of examiners.

As tending to show that the power of these boards cannot be arbitrarily exercised, see

People ex rel. Kelly v. *Scott*, 86 Hun, 174.

In *Dent* v. *West Virginia*, 129 U. S., 114, this court had before it the question of the power of a State to require a man desiring to practice medicine to possess certain qualifications, and to leave the decision of the fact of an applicant's having the prescribed qualfications to the State Board of Health.

I V.

Some complaint is made of the power to revoke licenses vested in the Mayor by the ordinance in the record. The ordinance expressly requires the Mayor to give the licensee notice before revoking his license, and evidently contemplates that the Mayor shall give the licensee a hearing. This feature of the ordinance invades no fundamental right of plaintiff in error, and, moreover, as he has never taken out a license, and, consequently, no one can be seeking to revoke his license, what complaint can he have?

V.

As to the contention of the plaintiff in error that the ordinance in the case at bar is void because the fee exacted is unreasonable, very little need be said. The rule of decision is correctly stated in

Van Hook v. *City of Selma*, 70 Ala., 361, 365.

"When the question of the reasonableness of a municipal by-law or city ordinance is raised, and it has reference to a subject-matter within the corporate jurisdiction, it will be presumed to be reasonable unless the contrary appears on the face of the law itself or is established by proper evidence."

See

Tiedeman, Limitations of Police Power, p. 274.

Cooley, Constitutional Limitations, Ed. 5, 245, note, and p. 614, note.

City of Burlington v *Putnam Ins. Co.*, 31 Iowa, 102.

A striking illustration of the application of this rule is found in the decision of this court above referred to, viz: *St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 92, 104.

How can this court judicially know that the amount of the license fee fixed in the ordinance at bar is unreasonable? The contrary is presumptively true.

The following are a few instances where license fees have been held to be not unreasonable:

$1,000 annually for a theatre, in

Boston v. *Schaffer*, 9 Pick., 415.

$15 annually for each car of a street railway company, in

State v. *Hilbert*, 72 Wis., 184.

An annual license fee of $200 for butchers, in

City of St. Paul v. *Colter*, 12 Minn., 41.

$150 per annum for retail liquors, in

Mayor v. *Beasley*, 1 Humphrey, 232.

$500 per annum for retail liquor dealers, in

Perdue v. *Ellis*, 18 Ga., 586.

$5 to $10 per annum on every vehicle used by milk dealers, in

People v. *Mulholland*, 82 N. Y., 324.

$200 annually for pawnbrokers, in

Van Baalen v. *The People*, 40 Mich., 258.

The Supreme Court of Illinois has said that it has always applied a liberal rule of construction in reference to license fees.

Kinsley v. *Chicago*, 124 Ill., 559, 363,

where the Illinois cases are cited.

The charter of the City of Chicago (Hurd's Revised Statutes, Ill. (1897), Chap. 24, Art. 5, Sec. 62, clause 4), gives to the City Council the power to fix the amount, terms and manner of issuing and revoking licenses. Under such a grant of power the amount of the fee which the City Council fixes, is rarely held to be unreasonable.

Childrey v. *The People*, 11 Mich., 43, 49, 50.

It is respectfully submitted, that the record in the case at bar shows no illegal invasion by the State of Illinois of any fundamental right of the plaintiff in error.

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HENRY SCHOFIELD,
Of Counsel.

GUNDLING *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 209. Argued March 22, 1900.—Decided April 9, 1900.

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The ordinance of the city of Chicago, authorizing the issue of a license to persons to sell cigarettes upon payment of one hundred dollars, and forbidding their sale without license, is no violation of the Federal Constitution, and the amount of the tax named for the license is within the power of the State to fix.

THE case is stated in the opinion.

Mr. Lee D. Mathias for plaintiff in error. *Mr. Charles H. Aldrich* was on his brief.

Mr. Frederic D. McKenney for defendant in error. *Mr. Charles M. Walker* and *Mr. Henry Schofield* were on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error was convicted in a police court of the city of Chicago of a violation of an ordinance of that city forbidding the sale of cigarettes by any person without a license, and was fined fifty dollars. From the judgment of conviction he appealed to the Criminal Court of Cook County, where it was affirmed, and thence to the Supreme Court of the State, where it was again affirmed, and he now brings the case here on writ of error.

Sections 1, 2 and 8 of the ordinance referred to read as follows:

"SEC. 1. The mayor of the city of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the city of Chicago, in the manner following and not otherwise.

"Any person, firm or corporation desiring a license to sell cigarettes shall make written application for that purpose to

the commissioner of health, in which shall be described the location at which such sales are proposed to be made. Said application shall be accompanied by evidence that the applicant, if a single individual, all the members of the firm if a copartnership, and person or persons in charge of the business, if a corporation, is or are persons of good character and reputation. The commissioner of health shall thereupon submit to the mayor the said application with the evidence aforesaid, with his opinion as to the propriety of granting such license, and if the mayor shall be satisfied that the persons before mentioned are of good character and reputation and are suitable persons to be entrusted with the sale of cigarettes, he shall issue a license in accordance with such application, upon such applicant filing a bond payable to the city of Chicago, with at least two sureties, to be approved by the mayor, in the sum of $500, conditioned that the licensed person, firm or corporation shall faithfully observe and obey all laws of the State of Illinois and ordinances of the city of Chicago now in force or which may hereafter be passed, with reference to cigarettes; provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, glycerine or sugar.

"SEC. 2. Every person, on compliance with the aforesaid requirements and the payment in advance to the city collector, at the rate of $100 per annum, shall receive a license under the corporate seal, signed by the mayor and countersigned by the clerk, which shall authorize the person, firm or corporation therein named to expose for sale, sell or offer for sale cigarettes at the place designated in the license; provided, that no license shall be granted to sell within 200 feet of a school house.

"SEC. 8. Any person who shall hereafter have or keep for sale or expose for sale or offer to sell any cigarettes at any place within the city of Chicago without having first procured the license provided shall be fined not less than fifty dollars and not exceeding two hundred dollars for every violation of this ordinance, and a further penalty of $25 for each and every day the person, firm or corporation persists in such violation after a conviction for the first offence."

The other sections are not material to this inquiry.

The plaintiff in error made no application to the health commissioner to obtain a license from the mayor in accordance with the above mentioned ordinance. He specially set up in the courts below that the ordinance was invalid, because in violation of the Fourteenth Amendment as depriving him of his property without due process of law. He contended in the state courts that the common council of the city of Chicago had no right to pass the ordinance in question, because no such power was given to it under the general act of the State of Illinois which incorporated the city of Chicago. The Supreme Court of the State, however, in construing that act decided that it did authorize the city to pass the ordinance, and the plaintiff in error admits that this decision is conclusive upon us as the decision of a question of local law by the highest court of the State.

He makes two claims here upon which he bases the statement that the ordinance violates his rights under the Fourteenth Amendment of the Federal Constitution. Quoting from counsel's brief, these claims are "*First*, that the State itself, acting through the common council of the city of Chicago, is inhibited by the Federal Constitution from making those provisions in the ordinance which delegate to the mayor the entire subject of granting and revoking licenses to persons engaged in the business of selling cigarettes; *second*, that the ordinance is unconstitutional and void as being an unreasonable exercise of the police power by imposing a license fee of $100, a sum manifestly greater than the expense of issuing the license and providing for the regulation, thereby depriving persons of their liberty and property by an interference with their rights which is neither necessary to the protection of others nor the public health."

He contends that the ordinance vests arbitrary power in the mayor to grant or refuse a license to sell cigarettes, and that such arbitrary power is a violation of the amendment in question.

He claims also that he has been denied the equal protection of the laws, because in other kinds of business, where licenses are granted to persons engaged in any trade or occupation, no

member thereof is "singled out and subjected to the absolute supervision of an irresponsible magistrate while his neighbor is protected in his right by the customary safeguards of the law."

It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat*, that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license.

But assuming that the question may be raised by him, we think the ordinance in question does not violate the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

The case principally relied upon by the plaintiff in error is that of *Yick Wo* v. *Hopkins*, 118 U. S. 356, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a protection against injury to

the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some two hundred other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance, so executed, was held void by this court. Speaking in that case of the general right to grant licenses in regard to occupations or trades, Mr. Justice Matthews, in delivering the opinion of the court, said:

"The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be entrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance as a security that he will faithfully observe and obey the laws of the State and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor. Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the State, and through it for the city to determine for itself, and that an ordinance providing

reasonable conditions upon the performance of which a license may be granted to sell such article does not violate any provision of the Federal Constitution.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

As stated in *Crowley* v. *Christensen*, 137 U. S. 86, "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community."

Whether there is or is not a delegation of power by the common council to the mayor, is not in this case a Federal question.

We have no doubt that the ordinance, so far as the objection above considered is concerned, was clearly within the power of the State to authorize, and must be obeyed accordingly.

The other objection made to the validity of the ordinance is that the amount of the license fee ($100) is an improper and illegal interference with the rights of the citizen, and is, therefore, a violation of the Fourteenth Amendment.

The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee therein named would seem to indicate that it is both a means adopted for the easier regulation of the business, and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the State has power to make the exaction, and its exercise by the city under state authority violates no provision of the Federal Constitution.

The Supreme Court of Illinois has held that the city was authorized by the state law to impose the license fee.

In speaking of a license to do business, it was said in *Royall* v. *Virginia*, 116 U. S. 572, 579: "The payment required as a preliminary to the license is in the nature and form of a tax, and is due to the State which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt and not an authority, except in that sense, because it is laid and collected as revenue, and not merely as incident to the general police power of the State, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort and convenience."

It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfils the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.

There is no error in the record, and the judgment of the Supreme Court of Illinois is

Affirmed.